

Search Warrants

TABLE OF CONTENTS

2.1	Overview	
	A. Purpose	1
	B. Authority and Definitions	1
	C. Issuance of Search Warrant in OUIL Cases	2
2.2	Minimum Standards	
2.2.1	Determining Whether to Issue Search Warrant	5
2.2.2	Initiating Search Warrant Process	
	A. Signature of Prosecuting Official	7
	B. Neutral and Detached Magistrate	7
2.2.3	Contents of Warrant - Descriptions	
	A. Place to be Searched	9
	B. Person to be Searched	9
	C. Property to be Seized	10
	D. Administrative Search Warrants	12
2.2.4	Property Subject to Seizure	13
2.2.5	Search Warrant Requirements for Monitoring Private Conversations	
	A. Third Party Monitoring	15
	B. Participant Monitoring and Participant Recording	15
	C. Participant Monitoring by Private Citizen	15

Search Warrants

TABLE OF CONTENTS (continued)

2.2	Minimum Standards (continued)	
2.2.6	Basis for Affidavit	
	A. Probable Cause Determination	17
	B. Affidavits Based on Hearsay Information	21
	C. Affidavits Based on Results of Preliminary Breath Test	22
2.2.7	Verifying the Affidavit	
	A. Swearing to Truth of Statements	23
	B. Signature	23
	C. Taping the Proceedings	23
	D. Probable Cause	23
2.2.8	Executing the Affidavit and Search Warrant	
	A. Affidavit	25
	B. Knock and Announce	26
2.2.9	Filing a Return on an Executed Search Warrant	27
2.2.10	Issuance of a Search Warrant by Electronic Device	
	A. Case Law Authority	29
	B. Public Act Authority	29
2.2.11	Suppression of Search Warrant Affidavits and Returns	31

Search Warrants

TABLE OF CONTENTS (continued)

2.3	Procedure	
2.3.1	Checklist for Issuing Search Warrant	33
2.3.2	Checklist for Issuing Search Warrant by Electronic Device	35
2.3.3	Facsimile Instructions	37
2.4	Forms	39

2.1 Overview

A. Purpose

The purpose of a search warrant is to offer the protections mandated by the Fourth Amendment of the United States Constitution against unreasonable searches and seizures, which states:

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

In Michigan Search and Seizure, the author states, “The Fourth Amendment was originally added to the Constitution by way of the Bill of Rights. The Bill of Rights were added to the United State Constitution by our forefathers because they felt that the constitution, as originally written, did not provide citizens with enough protection from the government. Hence, the Fourth Amendment guards against intrusions by the government. It does not protect citizens from illegal intrusions by private individuals . . . Thus, the Fourth Amendment protects the citizens against intrusions into their legitimate expectations of privacy by . . . a police officer.” See Michigan Search and Seizure for numerous references to cases discussing exceptions and interpretation of the application of the Fourth Amendment. [Michigan Search and Seizure: Intrusions into Fourth Amendment Protected Areas of Privacy, Steffel, Jeffrey John, 1993, Lansing Community College, Lansing, MI]

B. Authority and Definitions

The Revised Judicature Act states that district court magistrates may issue search warrants when authorized to do so by a district court judge. [MCL 600.8511(f)] This may be a blanket authorization. [People v Paul, 444 Mich 949; 511 NW2d 434] This means the district court judge can authorize a particular magistrate to issue search warrants generally. The Court of Appeals has held that a magistrate's authority to issue a search warrant need not be written. [People v White, 167 Mich App 461, 465-466; 423 NW2d 225 (1988)]

A search warrant may be executed outside the district, but within the State of Michigan, in which the magistrate is appointed to serve. In People v Fiorillo, 195 Mich App 695 (1992), the court said “. . . the statutes conferring jurisdiction on the district court are not territorially limited. Likewise, the statute governing the issuance of search warrants does not limit the authority of the warrants territorially. [MCL 780.651] No constitutional or statutory limits exist which prevent the district court from issuing search warrants to be executed outside the county of issuance. Since there is only one district court within the state, there is no need for

explicit statutory authorization allowing the district court to issue statewide search warrants.” This case does not give a magistrate or judge authority to issue a search warrant for an underlying case which will be heard in another district court.

The **affidavit for search warrant** is the document that sets forth the grounds for issuing a warrant, as well as the factual averments from which a finding of reasonable or probable cause may be made by the court.

The **search warrant** is the order by the court to search a particularly described place and to seize particularly described property. The validity of any search warrant depends entirely on the validity of the affidavit that supports it. The affidavit must be judged solely on the basis of the information it contains. If the affidavit is inadequate, then any search warrant issued as a result of it is also inadequate. There are 3 types of search warrants; general, administrative, and blood alcohol (OUIL cases). General search warrants are generally used to allow police to search an area for evidence of a crime or for contraband. Administrative search warrants are used in connection with arson investigation or to allow police or regulative bodies to ensure compliance with a regulating scheme. Examples include natural resources, public health, public safety, liquor control, building codes, etc. (see subchapter 2.2.3, page 12). Blood alcohol search warrants are used to authorize blood to be drawn from a suspect in a drinking and driving case to determine blood/alcohol levels. This usually occurs when a suspect has refused to submit to a breath test.

Probable cause to justify issuance of a search warrant is present "where the facts and circumstances presented would warrant a man of reasonable caution to believe that the items sought to be seized were in the stated place." [People v Dinsmore, 103 Mich App 660, 673; 303 NW2d 857 (1981)] See also, Carroll v United States, 267 US 132, 162; 69 LEd 543; 45 SCt 280 (1924).

An affidavit for a search warrant is non-public for 56 days after issuance. A request to further suppress the affidavit must be heard by a judge. [MCL 780.651(9)]

C. Issuance of Search Warrant in OUIL Cases

1. Blood Drawn for Medical Treatment

A prosecutor does not need a warrant to obtain blood alcohol test results that are taken for purposes of medical treatment. [People v Perlos, 436 Mich 305; 462 NW2d 310 (1990)] In Perlos, the court found that defendants do not have a protected Fourth Amendment interest in the results, when the blood was drawn for medical reasons, by medical personnel and not in connection with any police investigation and when a defendant is charged with felonious driving, negligent homicide, manslaughter with a motor vehicle, OUIL, UBAC, or impaired driving.

See People v Baker (*On Remand*), 187 Mich App 607, 608; 468 NW2d 319 (1991), where the Court of Appeals held that such blood test results are not admissible in a prosecution for second degree murder arising from the operation of a vehicle.

2. Blood Drawn to Determine the Presence of Alcohol or Controlled Substances

MCL 257.625a(6), authorizes the taking of a blood sample by court order, when a person has refused an officer's request to submit to a breath test, and the police officer has reasonable grounds to believe the person has committed the crime of felonious driving, negligent homicide, manslaughter with a motor vehicle, OUIL, UBAC, or impaired driving.

MCL 780.651(3) provides that if a court order required under MCL 257.625a is issued as a search warrant, the written search warrant may be issued in person or by any electronic means of communication, including by facsimile or over a computer network, by a judge or a district court magistrate. See below.

3. Issuance of a Search Warrant by Electronic Device

a. Case Law Authority

In People v Snyder, 181 Mich App 768; 449 NW2d 703 (1989), the Court of Appeals examined and upheld the validity of a search warrant issued by a telephone/facsimile procedure. For details, see subchapter 2.2.10, page 29.

b. Public Act Authority

Subsequent to the Snyder decision, the search warrant statute, MCL 780.651, was amended by 2003 PA 185, effective October 17, 2003. It now provides that an affidavit for a search warrant may be executed, and a search warrant may be issued, by means of electronic or electromagnetic communication, including by facsimile or over a computer network, if all the statutory requirements are met. For details, see subchapter 2.2.10, page 29.

2.2.1 Determining Whether to Issue Search Warrant

There are three statutes that specify the requirements for search warrants. They are MCL 780.651, MCL 780.653, and MCL 780.654.

The standard to follow in determining whether or not to issue a search warrant in a particular situation is: whether a reasonably cautious person could have concluded that there was a "substantial basis" for the finding of probable cause. [People v Russo, 439 Mich 584, 603; 487 NW2d 698 (1992)] In reviewing this situation in determining whether or not a particular magistrate should have issued the warrant, the reviewer simply needs to ensure that there is a substantial basis for the magistrate's conclusion that there is a fair probability that contraband or evidence of a crime will be found in a particular place." [Russo, at 604, quoting with approval Illinois v Gates, 462 US 213, 238; 76 Led2d 527; 103 SCt 2317 (1983)]

2.2.2 Initiating Search Warrant Process

A. Signature of Prosecuting Official

The signature of the prosecutor is not required to issue a search warrant. [MCL 600.8511(f) and People v Brooks, 75 Mich App 448,450; 254 NW2d 926 (1977).] While the Affidavit for Search Warrant (SCAO approved form DC 231) contains a box in the lower left-hand side for the signature of a reviewing prosecuting official, such a signature is not required.

B. Neutral and Detached Magistrate

The magistrate who issues a search warrant must be neutral and detached, and capable of determining whether probable cause exists. [Shadwick v City of Tampa, 407 US 345, 350; 32 LEd2d 783; 92 SCt 2119 (1972)]

In People v Payne, 424 Mich 475; 381 NW2d 391 (1986), the Supreme Court ruled that a magistrate who was also a court officer and a sworn member of the sheriff's department could not issue search warrants. The probable cause determination must be made by a person whose loyalty is to the judiciary alone, unfettered by professional commitment, and therefore loyalty, to the law enforcement arm of the executive branch.

In People v Lowenstein, 118 Mich App 475, 486; 325 NW2d 462 (1982); *lv den* 414 Mich 947 (1982), the Court of Appeals ruled that a magistrate was not neutral and detached when that magistrate had previously prosecuted defendant and had been sued by defendant.

The neutral and detached requirement was held not violated by a procedure where the police officers filling in the affidavit waited in the magistrate's chambers for a phone call that provided them with the additional information necessary to complete the search warrant affidavit. Once the call was received, the affidavit was filled in and then presented to the magistrate. The Court of Appeals said it saw nothing improper with this procedure, concluding that the mere fact police wait at the court does not mean that the magistrate has injected himself into the investigatory process. [People v Tejada (On Remand), 192 Mich App 635; 481 NW2d 814 (1992)]

2.2.3 Contents of Warrant - Descriptions

A. Place to be Searched

It is a basic principle of constitutional law that a warrant must particularly describe the place to be searched. [US Const, amend IV; Mich Const 1963, Art I, Sec 11] This requirement is also embodied in the search warrant statute, MCL 780.654; MSA 28.1259(4), which states "each warrant shall designate and describe the house or building or other location or place to be searched and the property or thing to be seized."

To fulfill this requirement, the place to be searched must be described with sufficient precision so as to exclude any and all other possible places. [People v Franks, 54 Mich App 729; 221 NW2d 441 (1974)] Ambiguous descriptions must be carefully avoided, especially when describing an individual living unit in an apartment or other form of multiple dwelling, or similar arrangements. Where street or apartment unit numbers are not in use, the unit should be described using precise geographical references.

A warrant to search a place not mentioned in the affidavit is unauthorized. [People v Lienartowicz, 225 Mich 303; 196 NW 326 (1923)]

B. Person to be Searched

The Michigan search warrant statute only provides for the requirement of particularized probable cause with respect to place and property. It does not discuss the legal requirements when a search warrant describes a person to be searched. However, there is case law which provides guidance regarding the legal requirements in this area.

In Ybarra v Illinois, 444 US 85; 62 LEd2d 238; 100 SCt 338 (1979), the US Supreme Court said that when a search warrant describes persons to be searched it "must be supported with probable cause particularized with respect to that person." The Court concluded that a search warrant authorizing the search of a public place (a bar) for narcotics does not allow a search of all person on the premises.

When a search warrant describes a person to be searched, based on the case law, the following legal requirements apply:

1. The search warrant must be supported with probable cause particularized with respect to that person. [Ybarra v Illinois, 444 US 85; 62 LEd2d 238; 100 SCt 338 (1979)]
2. If the search warrant is for a public place then the warrant may not authorize the search of all persons present during the execution of the search warrant. [Ybarra, *supra*]

3. If the search of private premises reveals controlled substances, then the occupants may be arrested and searched incident to their arrest. [People v Anterberry, 431 Mich 381; 429 NW2d 574 (1988) and Michigan v Summers, 452 US 692; 69 LEd2d 340; 101 SCt 258 (1981)]
4. If the search warrant is for private premises, the police may conduct a pat-down search of all persons arriving at the premises while the search is being conducted. [People v Jackson, 188 Mich App 117; 468 NW2d 523 (1991)]

C. Property to be Seized

1. Purpose of Particularity Requirement

The purpose of the constitutional requirement that the property being searched for be described with particularity is three-fold.

- First, the particularity requirement prevents general searches by defining the permissible intensity and length of the search.
- Second, it prevents the seizure of items mistakenly believed to fall within the magistrate's authorization.
- Finally, it prevents "the issuance of warrants on loose, vague or doubtful bases of fact." Go-Bart Importing Co v United States, 282 US 344, 357; 75 LEd 374 (1931).

Note that this latter purpose is closely tied to the requirement of establishing probable cause to search, which requires a finding that it is probable that the described items are connected with criminal activity, and that the items are located at the place to be searched. The less precise the description, the more likely that one or both of these probabilities have not been established.

One Court of Appeals panel held that the degree of specificity required depends on the circumstances and the types of items involved. [People v Zuccarrini, 172 Mich App 11, 15; 431 NW2d 446 (1988)]

In Zuccarrini, the Court of Appeals found the descriptions "all money and property acquired through the trafficking of narcotics," and "ledgers, records or paperwork showing trafficking in narcotics," were sufficiently particular since the executing officers' discretion in determining what was subject to seizure was limited to items relating to drug trafficking. *Id.*, at 16.

2. Situations Permitting Less Precise Descriptions

The courts have not been as demanding in requiring that the property to be seized be described with precise particularity:

- when the police have made their best efforts in acquiring all the descriptive facts that could reasonably be uncovered in an investigation of this type of crime and have included all those facts in the warrant. [Andersen v Maryland, 427 US 463, 478-484; 49 LEd2d 627; 96 SCt 2737 (1976)];
- when the nature of the items to be seized are such that they cannot be expected to have more specific characteristics (e.g., fungible goods). [State v Salsman, 290 A2d 618 (NH 1972)];
- when the property is contraband. [People v Mangialino, 348 NYS 2d 327 (1973)];
- when, in cases of failing to include all the available descriptive facts, the omitted facts could not be expected to assist the executing officer. [United States v Scharfman, 448 F2d 1352 (2d Cir 1971), *cert denied* 405 US 919 (1972)]; and
- when, in cases where certain descriptive facts were erroneously stated, the executing officer was nonetheless able to determine, from other available facts in the warrant, that the item seized was that intended by the description. [United States v Rytman, 475 F2d 192 (CA 5, 1973)]

3. Situations Requiring More Precise Descriptions

In the following situations, courts from other jurisdictions have been more demanding in requiring the property to be seized be described with precise particularity:

- when the items to be seized are generally in lawful use in substantial quantities. [In re 1969 Plymouth Roadrunner 455 SW2d 466 (Mo 1970)];
- when items of similar general description are likely to be found at the place to be searched. [People v Einhorn, 346 NYS 2d 986 (1973)]; and
- when the consequences of mistakenly seizing innocent items would be substantial (e.g., books, films, or the papers of news gathering organizations). [Stanford v Texas, 379 US 476; 13 LEd2d 431; 85 SCt 506 (1965) and Zurcher v Stanford Daily, 436 US 547; 56 LEd2d 525; 98 SCt 1970 (1978)]

D. Administrative Search Warrants

1. Investigating Causes of Fire

The Michigan Supreme Court has held that an investigation and inquiry into the cause or origin of a fire falls within the meaning of “search”, and that a warrant for such an investigation falls within the meaning of “search warrant” for the purposes of understanding both the federal Constitutional regulation of searches and search warrants. [US Const, Am IV and Mich Const 1963, Art 1, Sec. 11] An affidavit for such a warrant must show: 1) there was a fire; 2) the cause of the fire is undetermined; and 3) the purpose of the investigation is to determine cause and to prevent such fires from occurring or recurring. [MCL 29.6, People v Tyler, 399 Mich 564; 250 NW2d 467; *cert granted* 98 SCt 50, 434 US 814, 54 LEd2d 70; *affirmed* 98 SCt 1942, 436 US 499, 56 LEd2d 486 (1977)]

2. Inspection of Controlled Premises

Under the controlled substances act, a magistrate (defined as judge) within the magistrate’s jurisdiction, upon proper oath or affirmation showing probable cause, may issue a warrant for the purpose of conducting an administrative inspection and seizures of property appropriate to the inspection. [MCL 333.7504] When authorized by an administrative inspection warrant, an officer or employee designated by the department of licensing and regulation, upon presenting the warrant and appropriate credentials to the owner, operator, or agent in charge, may enter controlled premises for the purpose of conducting an administrative inspection. [MCL 333.7506] For details on procedure, see MCL 333.7501 et seq.

Although MCL 333.7502(1)(a) suggests that inspection warrants are not search warrants since they are listed as a separate entry in a list also including search warrants, this implication must be weighed against other evidence to the contrary. There are two reasons why administrative inspection warrants should be deemed search warrants, and the combination of these outweigh the grammatical prejudices against such inclusion.

First, the administrative inspections function in much the same way as do searches which fall under the regulation of other search warrant statutes and a description of the things to be searched must be included. [Mich Const 1963, Art 1, Sec 11, MCL 333.7504(2), MCL 333.7505(1)(d)]

Second, when discussing search warrants and those things applicable to search warrant standards, the terms “search” and “inspection” seem to be used almost interchangeably. [see also People v Tyler, 399 Mich 564 (1977), 573, Camara v Municipal Court of City & County of San Francisco, 387 US 523 (1967), 528-529]

2.2.4 Property Subject to Seizure

In addition to the statutory and constitutional requirements that the warrant particularly describe the property to be seized, a Michigan statute specifies the types of items for which a search warrant may issue. [MCL 780.652(a)-(g)] This statute provides that a warrant may be issued to search for and seize any property or other thing which is either:

- stolen or embezzled in violation of any law of this state;
- designed and intended for use or which is or has been used as the means of committing a criminal offense;
- possessed, controlled or used wholly or partially in violation of any law of this state;
- evidence of crime or criminal conduct on the part of any person;
- contraband;
- bodies or persons of human beings or of animals, who may be the victims of a criminal offense;
- the object of a search warrant under any other law of this state providing for same. If a conflict exists between this act and any other search warrant law, this act shall be deemed controlling.

Also, under general Michigan statutes, search warrants may be issued to search for the following. The court should make certain that the property to be seized under the warrant falls into one or more of these broad categories:

- Animals which may have been tortured. [MCL 752.26]
- Gaming implements. [MCL 750.308]
- Game and fish. [MCL 324.1602]
- Intoxicating liquors. [MCL 436.1235]
- Controlled substances. [MCL 333.7502]
- Pistols or other weapons unlawfully possessed. [MCL 750.238]

2.2.5 Search Warrant Requirements for Monitoring Private Conversations

Magistrates may not issue search warrants to monitor private conversations. This is governed by the Federal Omnibus Crime Control and Safe Streets Act of 1968. Under the act, a state may enact legislation to allow wiretap search warrants under the guidelines as established the federal act. However, as of this date, Michigan has not adopted any such statute. Therefore, wiretap warrants in Michigan can only be issued by a federal court.

A. Third Party Monitoring (Wiretaps)

The United States Supreme Court has held that third party monitoring (wiretaps) of private conversations, without the consent of either party, are subject to the warrant requirements of the Fourth Amendment. [*Katz v United States*, 309 US 347; 19 LEd2d 334; 92 SCt 507 (1967)]

B. Participant Monitoring and Participant Recording

In 1991, the Michigan Supreme Court overruled *People v Beavers*, 393 Mich 554; 227 NW2d 511 (1975) and held that a search warrant is not required to electronically mention and/or record a conversation when one of the parties to the conversation consents to the monitoring and/or recording. [*People v Collins*, 438 Mich 8; 475 NW2d 684 (1991)] The Court said it found no compelling reason to interpret the Michigan Constitution as affording greater protection than is provided under the Fourth Amendment of the Federal Constitution, and cited with approval *United States v Caceres*, 440 US 741; 59 LEd2d 733; 99 SCt 1465 (1979).

C. Participant Monitoring by Private Citizen

The Michigan eavesdropping statute makes it a felony for "any person to willfully use any device to eavesdrop upon the conversation without the consent of all parties thereto." [MCL 750.539c; MSA 28.807(3)] However, the Court of Appeals held that recordings made in violation of the statute are admissible in criminal cases. [*People v Livingston*, 64 Mich App 241; (1975)]

The *Livingston* panel concluded that a search warrant was not required because the tape recordings were done by the individual in his capacity as a private citizen, and not as an agent of the police. [64 Mich App at 256] The Court, noting that the Legislature did not put an exclusionary rule in the statute, said "we will not judicially create a remedy that the Legislature chose not to create." *Id*, at 255.

2.2.6 Basis for Affidavit

A. Probable Cause Determination

The affidavit is the beginning of the search warrant process. The requirement that it set forth grounds and establish probable cause to support the issuance of the warrant is a basic constitutional principle. [Spinelli v United States, 393 US 410, 413, n 3; 21 LEd2d 637; 89 SCt 584 (1969)] In addition, the Michigan search warrant statute states that "[the magistrates finding of reasonable or probable cause shall be based upon all the facts related within the affidavit before him or her." [MCL 780.653] Oral testimony not reduced to writing may not be used to supplement the information contained in the affidavit.

1. Probable Cause Defined

- The determination of whether the allegations of a given affidavit establish probable cause to believe that the articles to be seized may be found in the place to be searched is not governed by a rigid set of legal rules. For there to be probable cause, the facts must be such as would warrant a belief by "a prudent man", "a man of reasonable caution", or "a reasonable, discrete and prudent man." As the US Supreme Court stated in Beck v Ohio, 379 US 89, 97; 13 LEd2d 142; 85 SCt 223 (1964): "If subjective good faith alone were the test, the protection of the Fourth Amendment would evaporate, and the people would be 'secure in their persons, houses, papers, and effects,' only in the discretion of the police."
- Probable cause to justify issuance of a search warrant is present "where the facts and circumstances presented would warrant a man of reasonable caution to believe that the items sought to be seized were in the stated place." [People v Dinsmore, 103 Mich App 660, 673; 303 NW2d 854 (1981). See also, Carroll v United States, 267 US 132, 162; 69 LEd 543; 45 SCt 280 (1924)]
- The probable cause must be based on information and evidence independent of any illegal search. However, when a magistrate is making a probable cause determination, in a situation where some of the evidence arose from an illegal search, the magistrate must clearly indicate that his/her findings are based on information that is wholly unconnected with the illegal search. If not, the evidence seized during the warrant-authorized search must be suppressed. [Murray v US, 487 US 533; 101 LEd2d 472; 108 SCt (1988)]
- Whether probable cause exists for the issuance of a search warrant must be determined from the facts of each particular case at the time the showing is made for such warrant. [People v Chippewa Circuit Judge, 226 Mich 326, 328; 197 NW2d 539 (1924)]

- A search warrant may issue to search for drug paraphernalia when probable cause exists to believe such would be present. [People v Landt, 439 Mich 866; 475 NW2d 825 (1991)] The Supreme Court said that when the affidavit underlying the search warrant established probable cause to believe large amounts of a controlled substance are present at a residence, the magistrate could find probable cause to authorize a search for other items incident to drug trafficking.
- In applying the plain view doctrine, the Michigan Court of Appeals held the probable cause that justifies a warrantless search of an automobile cannot be established if police officers fail to locate and seize the plain-view contraband, alleged to have supplied the probable cause. [People v Martinez, 192 Mich App 57; 480 NW2d 302 (1991)]
- An application to seize items protected under the First Amendment need not be evaluated under a higher standard of probable cause than other areas of fourth amendment law, but rather should be evaluated on the same standard of probable cause used to evaluate other search warrant applications. [New York v P J Video, Inc., 475 US 868, 874; 89 LEd2d 871; 106 SCt (1986)]

2. Probable Cause Standard

A discussion of the probable cause standard is provided in several US Supreme Court cases:

- In Brinegar v United States, 338 US 160; 93 LEd 1879; 69 SCt 1302 (1949), the Court stated:

"In dealing with probable cause, as the very name implies, we are dealing with probabilities. These are not technical; they are the factual and practical considerations of everyday life on which reasonable and prudent men, not legal technicians, act. The standard of proof is accordingly correlative to what must be proved." [338 US at 175]

- In Illinois v Gates, 462 US 213; 76 LEd2d 527; 103 SCt 2317 (1982), the Court applied the standard for "particularized suspicion" to the probable cause standard:

"The process does not deal with hard certainties, but with probabilities. Long before the law of probabilities was articulated as such, practical people formulated certain common sense conclusions about human behavior; jurors as fact finders are permitted to do the same - and so are law enforcement officers. The evidence thus collected must be seen and weighed not in terms of library analysis by scholars, but as understood by those versed in the field of law enforcement." [462 US at 231-232, quoting United States v Cortez, 449 US 411, 418; 66 LEd2d 621; 101 SCt 690 (1980)]

- "As these comments illustrate, probable cause is a fluid concept $\frac{3}{4}$ turning on the assessment of probabilities in particular factual contexts $\frac{3}{4}$ not readily, or even usefully, reduced to a near set of legal rules." [462 US at 232]
- It is a solidly grounded Fourth Amendment principle that probable cause must be shown on the basis of facts rather than mere conclusions. [Aguilar v Texas, 378 US 108; 66 LEd2d 621; 84 SCt 1509 (1964).]
- Michigan Courts have echoed this sentiment, stating that the affidavit in support of a search warrant must contain facts rather than conclusions. [People v Hertz, 223 Mich 170; 193 NW2d 781 (1923); People v Coleman, 100 Mich App 587, 592; 300 NW2d 329 (1980)]
- However, the facts which would contribute to a conclusion may be taken into account. [Jones v US, 362 US 257, 271; 12 LEd2d 697; 80 SCt 725 (1960)] (Search warrant based on hearsay statements regarding location of narcotics upheld, when informant had previously given accurate information, the information was corroborated by another informant, and defendant was a known narcotics user.) The Court in Jones said since defendant was a known user of narcotics, the charge against him was much less subject to skepticism than would be a charge against one without such a history. *Id.*, at 271.

3. Staleness

- Stale information is insufficient as a basis for an affidavit because the right to issue a search warrant rests upon facts existing at the time the showing is made for the warrant. [People v Chippewa Circuit Judge, 226 Mich 326; 197 NW 539 (1924)] While the information upon which a warrant is based must be current, there is no requirement that the incriminating evidence must be fresh.

See People v Thivierge, 174 Mich App 258; 439 NW2d 446 (1988), *lv den* 432 Mich 908 (1989), where the defendant argued (among other things) that the police had to establish in their search warrant affidavit that the marijuana stems and seeds found in defendant's garbage bags were sufficiently fresh to presume that marijuana was still on the premises. The Thivierge Court said that the issue of delay should not focus on the how long an accused successfully withheld evidence, but on how long the police waited to act on the evidence once it was obtained. *Id.*, at 262.

- The measure of a search warrant's staleness does not rest on whether there is recent information to confirm that a crime is being committed, but whether there is probable cause which is sufficiently fresh to presume the items to be seized remain on the premises. The mere lapse of time between the occurrence of the underlying facts and issuance of the search warrant does not automatically render the warrant stale. [People v Osborn, 122 Mich App 63; 329 NW2d 533 (1982)]

- There is no definable rule as to how much time may intervene between the obtaining of the facts and that making of the affidavit upon which the search warrant is based, but the time should not be too remote. [People v Mushlock, 226 Mich 600; 198 NW 203 (1924)]
- Search warrant may issue only upon showing that reasonable cause exists to believe illegal activity is occurring at the time warrant is sought. [People v Siemieniec, 368 Mich 405; 118 NW2d 430; 100 ALR2d 522 (1962)]
- The measure of a search warrant's staleness "rests not on whether there is recent information to confirm that a crime is being committed, but on whether probable cause is sufficiently fresh to presume that the sought items remain on the premises." [People v Sundling, 153 Mich App 277, 286-287; 395 NW2d 308 (1986), *lv den* 428 Mich 887 (1987), quoting People v Gillam, 93 Mich App 548, 553; 286 NW2d 890 (1979)]

Sundling, also noted that "if a pattern of violations is established by a history of criminal activity, the lapse of time is less critical, especially where information has been received which confirms the basic information supporting the warrant." *Id.*, at 286.

- In People v Wright, 367 Mich 611; 116 NW2d 786 (1962), the Court held that an affidavit based on information existing as little as 6 days prior was insufficient to support a warrant. However, information that was several months old was deemed sufficient in People v Berry, 84 Mich App 604; 269 NW2d 694 (1970), or nearly one year old in People v White, 167 Mich App 461; 423 NW2d 225 (1988), where, in both cases, there were facts of a continuing criminal enterprise.
- In People v David, 119 Mich App 289, 296; 326 NW2d 485 (1982), the Court said that a 3 day delay does not automatically render an affidavit stale; however the Court went on to find that when there is no evidence to suggest that defendant would still possess marijuana 3 days after a single sale, the 3 day delay rendered the evidence insufficiently fresh to presume that there would still be marijuana on the premises.

See also, People v Russo, 185 Mich App 422, 435; 463 NW2d 138 (1990), where the Court of Appeals found that an affidavit based on information 7 years old, which contained no allegations of ongoing criminal activity, and which gave no reasons why the passage of time was irrelevant, was not sufficiently fresh to presume that the items sought still remained on the premises.

B. Affidavits Based on Hearsay Information

The Michigan statute pertaining to affidavits [MCL 780.653(a), (b)] provides that the affidavit may be based upon information supplied to the complainant by a named or unnamed person if the affidavit contains 1 of the following:

- *If the person is named*, affirmative allegations from which the magistrate may conclude that the person spoke with personal knowledge of the information.
- *If the person is unnamed*, affirmative allegations from which the magistrate may conclude that the person spoke with personal knowledge of the information, and either that the unnamed person is credible or that the information is reliable.

This makes Michigan's search warrant requirements, when based on hearsay from an unnamed informant, consistent with the "Aguilar-Spinelli" 2-prong test, and allows a choice between a showing of informant credibility and information reliability. [See Aguilar v Texas, 378 US 108; 66 LEd2d 621; 84 SCt 1509 (1963) and Spinelli v United States, 393 US 410; 21 LEd2d 637; 89 SCt 584 (1969)]

In Gates, the US Supreme Court abandoned the 2 prong test established by Aguilar and Spinelli and adopted the totality of the circumstances analysis for affidavits based on hearsay. Under Gates, the test is whether probable cause is demonstrated from a totality of the circumstances.

1. Informant Must Speak with Personal Knowledge

This requirement simply means that the informant or informants who supplied the factual information in the affidavit must have personally witnessed the facts which they attested to. It does not mean that an affidavit may not contain multiple hearsay. Multiple hearsay is acceptable so long as the ultimate sources of the information spoke with personal knowledge. If there is multiple hearsay, however, the affidavit must still satisfy another requirement with respect to each of the informants. [People v Osborn, 122 Mich App 63, 68-69; 329 NW2d 533 (1982)] That is, each of the informants who is unnamed must be shown to be credible, **or** the information from each of the informants must be shown to be reliable. [MCL 780.653(b)]

2. Informant Must be Credible or Information Must be Reliable

The affidavit must contain factual statements (rather than conclusions) from which the magistrate can determine that the informant is credible. The *pro forma* statement that the informant is a "credible person" does not satisfy this statutory requirement. [People v Sherbine, 421 Mich 502, 511, n 16; 364 NW2d 658 (1984)] The Sherbine majority lists three examples of the kinds of factual information to determine informant credibility:

- A course of past performance in which the informant has supplied reliable information;
- admissions against self interest; and
- verification of relevant details of the informant's story by reliable independent sources or police investigation. *Id* at 510, n 3.

As with the requirement of informant credibility, the alternative requirement of informational reliability must be established by factual statements in the affidavit. The requirement of showing the information to be reliable seems inextricably intertwined with the requirement of proving informant credibility.

In most cases, once informant credibility is established then it logically follows that the information is reliable, and vice-versa. A subtle distinction can be drawn, however, in situations where it is unknown how the information was procured. US Supreme Court, in Spinelli v United States, 393 US 410, 416; 21 LEd2d 637; 89 SCt 584 (1969), stated:

"In the absence of a statement detailing the manner in which the information was gathered, it is especially important that the tip describe the accused's criminal activity in sufficient detail that the magistrate may know that he is relying on something more substantial than a casual rumor circulating in the underworld or an accusation based merely on an individual's general reputation."

Thus, the reliability of information can be proven independent of informant credibility when the criminal activity is described in the warrant with precise detail.

C. Affidavits Based on Results of Preliminary Breath Test

Since other information which is not admissible at trial may be considered by a magistrate in issuing a search warrant, the result of a PBT, which is an investigative tool, may be considered by a magistrate when issuing the search warrant. [People v Tracy, 186 Mich App 171; 463 NW2d 457 (1990)]

D. Role of Magistrate

The magistrate must rely upon what is contained in the "four corners" of the affidavit. The best affidavit is one where the magistrate does not need to ask any questions about the incident, because all of the facts necessary for the magistrate to make a decision are clearly presented in the affidavit. Should the magistrate have any questions or the officer any additional comments, the magistrate cannot consider the answers to his or her questions or the additional comments in making a probable cause determination, unless the officer adds the information to the affidavit.

2.2.7 Verifying the Affidavit

A. Swearing to Truth of Statements

Once the court is satisfied that the warrant is in proper form and that the affidavit establishes probable cause to believe the items to be seized may be found in the place to be searched, the court must swear the affiant. The affiant should then be asked to state that the averments in the affidavit are true to the best of his or her information and belief. [MCL 780.651]

B. Signature

The affiant must sign the affidavit. [People v Goff, 401 Mich 412, 413-414; 258 NW2d 57 (1977), but see People v Mitchell, 428 Mich 364, 368; 408 NW2d 798 (1987)] In Mitchell, the Supreme Court reviewed their decision in Goff, and said that although search warrant based on an unsigned affidavit is presumed invalid, the prosecutor may rebut this presumption of invalidity by showing that the affidavit was made on oath to the magistrate.

C. Taping the Proceedings

Some magistrates and judges tape record the proceedings which occur when an affiant makes an application for a search warrant. Although this is not required, it is still good practice. It provides an "on the record" verification that the affiant was sworn and that he or she stated that the allegations in the affidavit were true to the best of his or her information and belief. However, the magistrate is not taking oral testimony, and the decisions must be made on the written affidavit.

D. Probable Cause

In determining whether there is probable cause to issue a search warrant, the magistrate should consider only the information contained in the affidavit. [MCL 780.653; MSA 28.1259(3); People v Coleman, 100 Mich App 587, 590 (1990); Aquilar v Texas, 378 US 108, 109, n 1; 66 Led2d 621; 84 SCt 1509 (1964)] If the affidavit is supplemented with oral testimony, this testimony must be preserved on the record. [People v Sloan, 450 Mich 160; 538 NW2d 380 (1995)]

2.2.8 Executing the Affidavit and Search Warrant

A. Affidavit

1. After the affiant has signed the affidavit, the court then signs and dates it. This indicates that the affidavit was signed and subscribed in the presence of the court on that date. The court then issues the search warrant by signing and dating it.

The requirement that the court sign the warrant is strictly construed. The Court of Appeals held that when the investigating officer signed on the line designated for the issuing magistrate, the warrant was invalid, as it could not issue without the signature of the neutral detached magistrate. [People v Locklear, 177 Mich App 331, 334; 441 NW2d 73 (1989)]

2. In People v Barkley, 225 Mich App 539 (1997), the court affirmed the circuit court's denial of a motion to suppress items seized in a search because the copy of the warrant that was served on the defendant at the time of the search did not bear the magistrate's signature. The magistrate in this case had signed and dated the original (return) warrant and the first (prosecutor's) and third (issuing judge's or magistrate's) copies but through oversight only dated the second (serve) copy. The court said that the evidence showed that the magistrate did make a determination that the search was warranted, and did intend to issue the warrant prior to the search since three copies of the warrant were signed prior to the search.
3. The court must retain the original affidavit and warrant for its own records. When using SCAO approved form DC 231, the court's copy is noted in the distribution.
4. Upon a showing that it is necessary to protect an ongoing investigation or the privacy or safety of a victim or witness, the magistrate may order the affidavit be suppressed and not be given to the person whose property was seized or whose premises were searched until that person is charged with a crime or named as a claimant in a civil forfeiture proceeding involving evidence seized as a result of the search. Upon execution of a search warrant the officer is not required to give a copy of the affidavit to that person or to leave a copy at the place from which property was taken. [MCL 780.654(3), 780.655(1)]
5. An affidavit contained in any court file or record retention system is nonpublic information for 56 days following issuance. A further request to suppress must be heard by a judge. [MCL 780.651(9)]

B. Knock and Announce

1. Michigan's knock-and-announce statute provides that an officer executing a warrant who is denied admittance after notice of his authority "may break any outer or inner door or window of a house or building, or anything therein." [MCL 780.656] The Michigan Court of Appeals has interpreted this statute to require officers to identify themselves, and state their authority and purpose before entering a private residence. [People v Polidori, 190 Mich App 673, 676; 476 NW2d 482 (1991)]
2. The failure to comply with the requirements of the knock-and-announce statute requires application of the exclusionary rule and suppression of the evidence if the Fourth Amendment standard of reasonableness is also violated. Polidori, *supra* at 677.
3. Officers may request permission to ignore the "knock and announce" rule in executing search warrants. Under statute, in the execution of a search warrant, officers must give notice of their authority and purpose and be refused entry before they are allowed to force their way in. [MCL 780.656]
4. The court has carved out exceptions to the knock and announce rule, such as in cases where officers have a basis to conclude that evidence will be destroyed or lives will be endangered by the delay of complying with the statute or events indicate that compliance would be a useless gesture. [People v Williams, 198 Mich App 537; 499 NW2d 404 (1993)]
5. The officer also has no duty to announce is presence when to do so would permit a defendant to escape justice, endanger the life or safety of police officers or the public, or would lead to the destruction of material evidence. People v Kerschner, 132 Mich App 623; 348 NW2d 282 (1984)]
6. Language such as: "weapons are usually present in homes of narcotics traffickers" or other such boilerplate language is not enough to nullify the knock and announce rule. The officers must show that evidence in this case is kept in a manner that would facilitate immediate destruction or that these particular defendants possessed weapons. [People v Asher, 203 Mich App 621; 513 NW2d 144 (1994), People v Ortiz, 224 Mich App 468; 569 NW2d 653 (1997)] See also 456 Mich 944 (1998 which overruled a portion of People v Ortiz with regard to violation of the knock-and-announce requirement.

There is no authority that allows a court to permit officers in advance to dispense with the knock and announce rule. Check with your chief judge to determine your court's policy in this area.

2.2.9 Filing a Return on an Executed Search Warrant

MCL 780.655 requires the officer executing the search warrant to list on the return all the property being seized. The statute states as follows:

"When an officer in the execution of a search warrant finds any property or seizes any of the other things for which a search warrant is allowed by this act, the officer, in the presence of the person from whose possession or premises the property or thing was taken, if present, or in the presence of at least 1 other person, shall make a complete and accurate tabulation of the property and things so seized. The officer taking property or other things under the warrant shall forthwith give to the person from whom or from whose premises the property was taken a copy of the warrant and shall give to the person a copy of the tabulation upon completion, or shall leave a copy of the warrant and tabulation at the place from which the property or thing was taken. The officer is not required to give a copy of the affidavit to that person or to leave a copy at the place from which the property or thing was taken. He shall file the tabulation promptly with the court or magistrate."

Failure to strictly comply with the requirement that a copy of the documents be left with the person from whose premises the items were taken does not require subsequent suppression of the seized evidence. [People v Lucas, 188 Mich App 554, 573; 470 NW2d 460 (1991)] Because defendant was given the documents the following day at his arraignment, the court found the violation of the statute "hyper-technical."

Courts should establish a policy for proper handling of return on executed search warrant.

The statute covering the custody and disposal of the property is MCL 780.655.

2.2.10 Issuance of a Search Warrant by Electronic Device

A. Case Law Authority

In People v Snyder, 181 Mich App 768; 449 NW2d 703 (1989), the Court of Appeals examined and upheld the validity of a search warrant issued by a telephone/fax procedure.

In Snyder, the arresting officer sought a search warrant authorizing the withdrawal of a blood sample of a defendant arrested for drunk driving. The officer telephoned the judge at home, and then faxed a copy of the unsigned warrant documents to the judge's home. The officer raised his right hand and swore to the affidavit. The officer then signed the affidavit and faxed it to the judge, who then signed the warrant and faxed a copy to the officer.

The circuit court found that the search warrant was deficient because the oath was not taken within the presence of the court. The Court of Appeals reversed the trial court, finding the telephone/fax procedure valid because there was no statutory or constitutional impediment to the manner in which the warrant was obtained. The Court found that the telephone link by which the officer and the judge communicated created enough of a presence to satisfy the oath requirement of the search warrant statute. [People v Paul, 203 Mich App 55; (1993)]

B. Public Act Authority

Subsequent to the Snyder decision, the search warrant statute, MCL 780.651, was amended by 1990 PA 43, effective March 29, 1990. It now provides that an affidavit for a search warrant may be executed, and a search warrant may be issued, by means of electronic or electromagnetic communication, including by facsimile or over a computer network, if all the statutory requirements are met.

The amended statute further provides that when an oath or affirmation is orally administered by electronic or electromagnetic means of communication under this section, the oath or affirmation is considered to be administered before the judge or district court magistrate. [MCL 780.651(6), see also MCL 600.1441]

C. Authority of Magistrate to Issue

2003 PA 185 amended MCL 780.651, effective October 17, 2003 to clarify that a magistrate may issue any search warrant by facsimile or over a computer network. See subchapter 2.1, C, page 3.

2.2.11 Suppression of Search Warrant Affidavits and Returns

A search warrant, affidavit, or tabulation contained in any court file or record retention system is nonpublic information until the 56th day following issuance unless the peace officer or prosecuting attorney obtains a suppression order from a judge. An initial suppression order expires on the 56th day after it is issued. A subsequent suppression order shall expire on a date specified in the order. Access should be limited to court officials, the prosecutor, and the police agency which executed the warrant. Upon a showing that it is necessary to protect an ongoing investigation or the privacy or safety of a victim or witness, the magistrate may order the affidavit be suppressed and not be given to the person whose property was seized or whose premises were searched until that person is charged with a crime or named as a claimant in a civil forfeiture proceeding involving evidence seized as a result of the search. [MCL 780.651(9), 780.654(3)]

2.3.1 CHECKLIST FOR ISSUING SEARCH WARRANT

- ☐ Examine affidavit and search warrant.
- ☐ Determine that person, place or thing to be searched is described with particularity.
- ☐ Determine that property to be searched for and seized is described with particularity.
- ☐ Determine that the property is a proper subject for seizure. See subchapter 2.2.4, page 13 for a list of property that may be the subject of a search warrant.
- ☐ Determine that the affidavit establishes probable cause to believe that the articles to be seized may be found in place to be searched.
- ☐ If the affidavit is based on information supplied to affiant by named person, determine that affidavit contains affirmative allegations from which the magistrate may conclude that the named person spoke with personal knowledge of the information.
- ☐ If the affidavit is based on information supplied to affiant by an unnamed person, determine that affidavit contains affirmative allegations from which the magistrate may conclude that the unnamed person spoke with personal knowledge; and that the unnamed person is credible, or that the information is reliable.
- ☐ Administer oath to affiant. Ask if allegations in affidavit are true to best of affiant's information and belief. Then, have affiant sign affidavit.
- ☐ Sign and date affidavit and search warrant.
- ☐ Retain original affidavit and original copy of warrant.
- ☐ Direct officer in charge to leave a completed copy of the return to the search warrant at the place searched.
- ☐ Ensure a filled out return to the search warrant is promptly filed with the court after execution of search.

2.3.2 CHECKLIST FOR ISSUING SEARCH WARRANT BY ELECTRONIC DEVICE

- ☐ Upon receipt of a phone call requesting that a warrant be issued, have officer read the affidavit and search warrant.
- ☐ Determine that person, place or thing to be searched is described with particularity.
- ☐ Determine that property to be searched for and seized is described with particularity.
- ☐ Determine that the property is a proper subject for seizure. See subchapter 2.2.4, page 13 for a list of property that may be the subject of a search warrant.
- ☐ Determine that the affidavit establishes probable cause to believe that the articles to be seized may be found in place to be searched.
- ☐ If the affidavit is based on information supplied to affiant by named person, determine that affidavit contains affirmative allegations from which the magistrate may conclude that the named person spoke with personal knowledge of the information.
- ☐ If the affidavit is based on information supplied by an unnamed person, determine that affidavit contains affirmative allegations from which the magistrate may conclude that the unnamed person spoke with personal knowledge; and that the unnamed person is credible, or that the information is reliable.
- ☐ Orally administer oath. Ask if allegations in affidavit are true to best of affiant's information and belief. Have affiant sign affidavit and then fax it to the judge or magistrate.
- ☐ Sign and date affidavit and search warrant and FAX them to affiant.
- ☐ Retain original affidavit and original copy of warrant and file with clerk's office.
- ☐ Direct officer in charge to leave a completed copy of the return to the search warrant at the place searched.
- ☐ Ensure a filled out return to the search warrant is promptly filed with the court after execution of search.

2.3.3 Facsimile Instructions

- ☐ Police agency calls magistrate by telephone.
- ☐ The magistrate swears in the officer and asks the officer to read the factual information contained in the affidavit (including the number to FAX the Warrant back to).
- ☐ Police agency calls from their FAX unit and transmits the affidavit and proposed warrant.
- ☐ The magistrate receives the FAX.
- ☐ After the warrant is received, the magistrate reviews the affidavit and signs both the affidavit and the warrant.
- ☐ Retain original affidavit and original copy of warrant and file with clerk's office.
- ☐ The magistrate loads the affidavit and warrant into the FAX unit and calls the police agency fax number and transmits the document.

[MCL 780.651(2)(a), (b)]

2.4 Forms

Below is a list of the SCAO Approved forms used in issuing search warrants.

DC 231 - Affidavit for Search Warrant, Search Warrant

DCY 231a - Affidavit for Search Warrant (continuation)